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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO GOMEZ,

Defendant and Appellant.

B216794

(Los Angeles County
Super. Ct. No. BA335199)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Norman J. Shapiro, Judge. Affirmed in part and reversed in part.

Brett Harding Duxbury, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D.
Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Roberto Gomez appeals from the judgment entered after his conviction by jury of one count each of first degree murder (Pen. Code, § 187, subd. (a))¹ and assault with a semiautomatic firearm (§ 245, subd. (b)), with true findings by the jury on related firearm and gang enhancements. He challenges the constitutionality of CALJIC No. 2.92 and the sufficiency of evidence to support a great-bodily-injury enhancement (§ 12022.7, subd. (a).) Defendant also requests an adjustment of his presentence custody credit. We agree with the last two points and modify the judgment accordingly.² In all other respects we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Shooting

On the night of November 26, 2007, Juan Garcia drove up to his house. His wife Patricia Popoca was sitting next to him. Her three children were in the back seat of the car. When Garcia parked, a man approached the car, opened the driver's door and produced a gun. Garcia, a former member of Barrio Mojados or the B.M.S. gang, pleaded with the man not to shoot him in front of his family to no avail. The man shot Garcia six to eight times and then walked away. Popoca did not see anyone other than the shooter. However, her 11-year-old child saw another man standing near the passenger side of the car, who fired his gun at the same time, before he fled. Garcia suffered six gunshot wounds and died. Popoca's leg was struck by a bullet that passed through her thigh. She was treated at the hospital.

Officers from the Los Angeles Police Department found expended cartridges at the site of the shooting, indicating three different kinds of guns had been fired at the time.

¹ Statutory references are to the Penal Code unless otherwise indicated.

² Defendant asserts, the People acknowledge, and we agree the minute order of the sentencing hearing and the abstract of judgment should be corrected to show defendant was awarded 480 days, rather than 420 days, of presentence custody at the sentencing hearing. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181,185.)

No firearms were recovered. Popoca described the gun of the shooter she saw as a semiautomatic rather than a revolver.

2. The Identification of Defendant as One of the Shooters

About three weeks later, police received an anonymous tip that “Casper,” “Chuckie” and “Criminal” from the 38th Street gang were involved in the shootings. Popoca was shown a group of six photographs (a photographic six-pack lineup) that contained a photograph of Casper. Popoca was unable to identify the shooter she saw from the six-pack. Days later, she was shown another six-pack that included a photograph of defendant, whose gang moniker was Criminal. Popoca identified defendant, who was photographed with a tattoo on his forehead, as the shooter she saw. Popoca told police the shooter she saw had a dark mark on his forehead. Thereafter, Popoca saw defendant drive by her home twice in a red Chrysler and notified police. Popoca’s child also identified defendant as the person who was standing by the driver’s door of the car that night.

At the preliminary hearing and at trial, Popoca identified defendant as the shooter she saw. Her child identified defendant at trial as one of the shooters.

A gang expert testified that defendant was a self-admitted member of the 38th Street gang, which is a rival of the B.M.S. gang and the shooting of Garcia occurred in an area claimed by the B.M.S. gang.

Defendant did not testify on his own behalf. Maria Rodriguez, a neighbor of Garcia and Popoca, testified she was in front of her house when she saw two men standing near Garcia’s car, one near the driver’s door, the other man on the sidewalk. Rodriguez initially thought the man beside the driver’s door was Garcia, but she later realized it was someone else. Rodriguez heard two shots, saw a flash in the hand of the man on the sidewalk and heard another shot. Frightened, Rodriguez ran inside her home. It was dark; Rodriguez never saw the face of either man. Psychologist Robert Shomer testified as a defense expert on the unreliability of eyewitness identification.

3. *The Verdict and Sentence*

The jury found defendant guilty of first degree murder of Garcia and assault with a semiautomatic firearm against Popoca. As to the murder, the jury found that defendant personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subds. (b), (c) & (d)). As to the aggravated assault, the jury found that defendant personally had used a firearm (§ 12022.5, subd. (a)(1)) and personally had inflicted great bodily injury (§ 12022.7, subd. (a)) on Popoca. As to both counts, the jury found the gang allegations to be true (§ 186.22, subd. (b)(1)).

The trial court sentenced defendant to an aggregate state prison term of 82 years to life.

DISCUSSION

1. *The Constitutionality of CALJIC No. 2.92 Has Been Repeatedly Affirmed*

Defendant argues, in light of a number of studies and decisions from other states criticizing the reliability of eyewitness identifications, we should reconsider the constitutionality of CALJIC No. 2.92, which contains several factors (in particular, stress, memory and certainty) defendant challenges as non-neutral.³ We decline this invitation.

³ As given in this case CALJIC No. 2.92, the eyewitness identification instruction routinely used by trial courts until the adoption of CALCRIM No. 315 in 2006, stated: “Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness’ identification of the defendant, including, but not limited to, any of the following: ¶ The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act; ¶ The stress, if any, to which the witness was subjected at the time of the observation; ¶ The witness’[s] ability, following the observation, to provide a description of the perpetrator of the act; ¶ The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness; ¶ The cross-racial or ethnic nature of the identification; ¶ The witness’[s] capacity to make an identification; ¶ Evidence relating to the witness’[s] ability to identify the alleged perpetrator of the criminal act; ¶ Whether the witness was able to identify the alleged perpetrator in a photographic lineup; ¶ The period of time between the alleged criminal act and the witness’[s] identification; ¶ Whether the witness had prior contacts with the alleged perpetrator; ¶ The extent to which the witness is either certain or uncertain of the

The constitutionality of CALJIC No. 2.92 has been repeatedly affirmed by the Supreme Court, as has its successor, CALCRIM No. 315, which includes similar factors for the jury to evaluate in weighing an eyewitness identification.⁴ (See e.g., *People v. Wright* (1988) 45 Cal.3d 1126, 1144 (*Wright*); *People v. Johnson* (1992) 3 Cal.4th 1183, 1232; *People v. Ward* (2005) 36 Cal.4th 186, 213 (*Ward*); see also *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561-562.)

In *Wright* the Supreme Court instructed CALJIC No. 2.92 “should be given . . . in a case in which identification is a crucial issue” (*Wright, supra*, 45 Cal.3d at p. 1144.) “[T]he listing of [eyewitness identification] factors to be considered by the jury will sufficiently bring to the jury’s attention the appropriate factors, and . . . an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate. The instruction should list the applicable factors in a neutral and nonargumentative instruction, thus effectively informing the jury without improperly invading the domain of either jury or expert witness.” (*Id.* at p. 1143, fn. omitted.) The Court generally approved giving standard instructions concerning eyewitness identification factors, provided defense counsel is given an opportunity to suggest additional or supplemental factors. (*Ibid.*; see *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1383.) If a defendant wishes to educate the jury as to the unreliability of eyewitness testimony in certain respects, he or she must use means other than jury instructions, such as expert testimony. (*Wright*, at pp. 1153-1154.) *Wright* also explains that “expert testimony has the advantage of being subject to cross-examination and rebuttal, thus allowing the jury to determine for itself the weight it should give to expert opinions, rather than binding the jury to accept certain experts’ views.” (*Id.* at p. 1154.) Defendant presented an expert

identification; ¶ Whether the witness’[s] identification is in fact the product of her own recollection; and ¶ Any other evidence relating to the witness’[s] ability to make an identification.”

⁴ We are, of course, obligated to follow Supreme Court precedent. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

witness on eyewitness identification, and defense counsel vigorously argued to the jury that eyewitness identification was inherently unreliable, in view of the expert testimony and the conflicting eyewitness identification testimony in this case.

2. Insufficient Evidence Supports the Jury's True Finding on the Section 12022.7, Subdivision (a) Great Bodily-Injury Enhancement

To assess a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Defendant contends the jury’s finding he personally inflicted great bodily injury on Popoca must be reversed. He argues that because the evidence established at least two shooters fired three guns at the time, the jury could not have reasonably determined which of the two shooters fired the bullet that struck Popoca.

Section 12022.7, subdivision (a) requires the *personal* infliction of great bodily injury.⁵ Thus, the statute authorizes imposition of an additional penalty “on those principals who perform the act that directly inflicts the injury.” (*People v. Cole* (1982) 31 Cal.3d 568, 571.) The People acknowledge on appeal, as they did at trial, that “it was impossible [from the evidence] to tell which shooter caused Popoca’s injury.” Nonetheless, citing *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*), the People maintain that because one of defendant’s gunshots could have injured Popoca, “he should not escape punishment” for injuring her, “simply because he engaged in the shooting with another individual, thus making it impossible to determine who actually inflicted the wound.”

The People’s argument is unavailing. The instruction addressing the section 12022.7, subdivision (a) great-bodily-injury enhancement is CALJIC No. 17.20. It contains an optional paragraph that applies to cases involving group beatings where it is not possible to determine which of several assailants inflicted a particular injury and allows the jury to find true the great-bodily-injury enhancement if certain conditions are met.⁶ *Modiri* held the trial court did not err in instructing the jury with this optional

⁵ Under section 12022.7, “[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years.” (§ 12022.7, subd. (a).) The term great bodily injury means “a significant or substantial injury.” (§ 12022.7, subd. (f).)

⁶ That portion of CALJIC No. 17.20 that applies to cases involving group beatings reads: “When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if [] the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim [], that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim. ¶ The People have the burden of proving the truth of this allegation. If you

paragraph of CALJIC No. 17.20 because nothing in its language permitted the jury to find true the special allegation under section 12022.7, subdivision (a) without concluding the defendant personally had inflicted great bodily injury on the victim.⁷ (*Modiri, supra*, 39 Cal.4th at pp. 494-495.)

In this case, the optional paragraph pertaining to group beating was intentionally omitted from CALJIC No. 17.20 as read to the jury.⁸ Thus, any suggestion that *Modiri* or the group beating theory of CALJIC No. 17.20 was somehow relevant here is specious. Furthermore, we decline to find there was sufficient evidence based on the People's speculation that one of defendant's bullets could have struck Popoca's leg. As with substantive offenses, factual predicates of enhancement allegations must be proven beyond a reasonable doubt. (See § 1170.1) The great-bodily-injury finding of section 12022.7, subdivision (a) is not supported by sufficient evidence.

have a reasonable doubt that it is true, you must find it to be not true.” (CALJIC No. 17.20.)

⁷ Although the issue in *Modiri* specifically related to the personal-infliction requirement of section 1192.7, subdivision (c)(8), deeming any felony in which the defendant personally inflicts great bodily injury on any person other than an accomplice a “serious felony,” the Court applied its holding equally to the personal-infliction requirement in section 12022.7, subdivision (a). (*Modiri, supra*, 39 Cal.4th at pp. 495-496 [“participation in a group attack may satisfy sections 1192.7(c)(8) and 12022.7(a) where the defendant personally uses force against the victim, and the precise injurious effect is unclear”]; see also *id.* at pp. 491, 498.)

⁸ The trial court's complete instruction to the jury under CALJIC No. 17.20, provided, “It is alleged in count 2 [assault with a semiautomatic firearm] that, in the commission of that felony the defendant personally inflicted great bodily injury on a person, Patricia Popoca. If you find the defendant guilty in count 2, a felony, you must determine whether the defendant personally inflicted great bodily injury on some person, in this case, Patricia Popoca. [¶] Great bodily injury, as used in this instruction, means a significant or substantial physical injury. Minor, trivial, or moderate injuries do not constitute great bodily injury. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.” The optional paragraph was blacked out or purposefully excised from the instruction.

DISPOSITION

The true finding on the section 12022.7, subdivision (a) great-bodily-injury enhancement as to count 2 is reversed. The award of presentence custody credit is corrected as 480 total days rather than 420 total days. The judgment on counts 1 and 2 and the remaining enhancements is affirmed. The superior court shall prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

WOODS, Acting P.J.

We concur:

ZELON, J.

JACKSON, J.